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HIGH COURT OF CHHATTISGARH AT BILASPUR
Criminal Appeal No. 899 of 2004

APPELLANT Chandrapal Chik

Vs.

RESPONDENT State of Chhattisgarh

Criminal Appeal No. 917 of 2004

APPELLANT Mangleshwar Uraon

Vs.

RESPONDENT State of Chhattisgarh

Judgments post for 15-10-2007

Sd/-
Dhirendra Mishra
Judge

(33)

HIGH COURT OF CHHATTISGARH AT BILASPUR
Criminal Appeal No. 899 of 2004

APPELLANT (In jail) — Chandrapal Chik, Son of Mohan Chik, aged 19 years, Occupation Mazdoori, resident of Village Ratiya, Chowki Lodam, P.S. Jashpur, District Jashpur (Chhattisgarh)

Vs.

RESPONDENT — State of Chhattisgarh, Through Station Incharge, Chowki Lodam, Police Station Jashpur, District Jashpur (Chhattisgarh)

PRESENT: Ku. Sangeeta Mishra, Advocate for the appellant.
Shri Sandeep Yadav, Dy. Govt. Advocate, for the State.

HIGH COURT OF CHHATTISGARH AT BILASPUR
Criminal Appeal No. 917 of 2004

APPELLANT ACCUSED (in Jail) — Mangleshwar Uraon, S/o Bihanu Ram, aged about 20 years Occupation: Student R/o Vill. Tetertoli, P.S. Raidih, Distt. Gumla (Jharkhand)

Vs.

RESPONDENT — State of Chhattisgarh
Through Station House Officer, Out Post: Lodan, P.S. Jashpur, Distt. Jashpur Nagar (Chhattisgarh)

PRESENT: Ku. Sharmila Singhal, Advocate for the appellant.
Shri Sandeep Yadav, Dy. Govt. Advocate, for the State.

J U D G M E N T
(15-10-2007)

Dhirendra Mishra, J

Criminal Appeal No. 899/2004 filed by appellant Chandrapal Chik and Criminal Appeal No. 917/2004 filed by appellant Mangleshwar Uraon are being disposed of by this common judgment as these appeals are directed against the judgment of conviction and order of sentence dated 30-9-2004 passed in S.T. No. 80/2004 whereby learned Additional Sessions Judge, Jashpur has convicted the appellants under Sections 458/34, 395 and 376(2)(g) of I.P.C. and sentenced each of them to undergo 10 years with fine of Rs.1000/-, in default of payment of fine, to undergo additional R.I. for 6 months; to undergo R.I. for 10 years with fine of Rs.2000/- and in default of payment of fine to further undergo additional R.I. for one year; and to undergo R.I. for 10 years with fine of Rs.3000/- and in

default of payment of fine to further undergo additional R.I. for one year respectively. All the sentences have been directed to run concurrently.

2. Case of the prosecution, in brief, is that on 12-2-2004 at about 10.00 p.m. when Kalista Lakda (P.W. 3) and the prosecutrix (P.W. 2) were preparing to sleep after taking their dinner, accused persons aged about 18 to 20 years entered in their house from kitchen room. One of them was short stature whereas the other one was tall and bulky. They caught Kalista Lakda and waved up knife and thereafter they entered in the room, opened the boxes and almirah, spread articles and took out cash of Rs. 2,000/- and solar plate. One of the boys entered in the room of the prosecutrix. All were speaking Sadri and asked not to raise alarm on the threat of knife. After committing the crime, they went away from wall of kitchen side. The prosecutrix told her that they raped her. The report was lodged in the following morning in police Out Post Lodak vide Ex. P-8.

3. During investigation blood stained underwear and mark sheet of the prosecutrix were taken into possession vide Ex. P-1. Vaginal slides of the prosecutrix were taken into possession vide Ex. P-2. Site plan was got prepared by Halka Patwari vide Ex. P-7. The appellants were arrested on 15-2-2004. On the memorandum of appellant Chandrapal, thread bomb and cash amount of Rs. 470/- in denomination of 100 x 4, 50 x 1 and 20 x 1 was taken into possession vide Ex. P-10. Underwear of accused Chandrapal was also taken into possession vide Ex. P-11. Five notes of 100 denomination were taken into possession vide Ex. P-13. The prosecutrix was sent for medical examination to District Hospital, Jashpurnagar vide Ex. P-18 where Dr. (Smt.) Kumud Kerketta (P.W. 5) examined her and gave her report of Ex. P-14. Test identification parade was conducted by P.W. 7 Uday Raj Singh where the prosecutrix (P.W. 2) and Kalista Lakda (P.W. 3) correctly identified appellant Mangleshwar vide Ex. P-5 and Chandrapal vide Ex. P-6. After completing the investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, Jashpur against the appellants whereas charge sheet against accused Sukhvinder and Samaru Ram was filed before the Juvenile Justice Board as they are below 18 years showing accused Surjeet Singh Ghasi absconding.

4. During trial the prosecution examined 9 witnesses in all thereafter statements of accused persons were recorded in which they pleaded innocence and false implication.

5. After hearing the counsel for the parties, the trial Court convicted and sentenced the appellants as mentioned above.

6. Learned counsel for the appellants submits that conviction of the appellants is based on statement of the prosecutrix (P.W. 2) and Kalista Lakda (P.W. 3). The same is also based on identification of the appellants by the complainant and the prosecutrix in the test identification parade conducted by P.W. 7 Uday Raj Singh. Referring to the witnesses P.W. 2 the prosecutrix and P.W. 3 Kalista Lakda, it is argued that both the witnesses have stated in their deposition that the accused persons covered their faces with masks and therefore, they could not identify them, however this aspect has been totally ignored by the trial Court. In the F.I.R. as well as diary statement, P.W. 3 Kalista Lakda has made allegations that one person has committed rape whereas the prosecutrix (P.W. 2) has alleged commission of rape by three persons. Apart from the prosecutrix and Kalista Lakda, Sudhram also resides in the house where the incident occurred, however he was neither interrogated during investigation nor he has been examined as a witness. Reliance is placed in the matter of **Ravi @ Ravichandran –v- State**[1], **Ranbir & others –v- State of M.P.**[2], **Hari Nath and another –v- Chhabi Nath**[3], and **Girja Shankar Misra –v- State of U.P.**[4].

7. On the other hand, learned counsel for the State has supported the impugned judgment.

8. I have heard learned counsel for the parties. I have perused the impugned judgment as also the evidence available on record.

9. Conviction of the appellant is based on statement of P.W. 2 the prosecutrix and P.W. 3 Kalista Lakda, the complainant. The trial Court has relied upon the test identification parade conducted by P.W. 7 Uday Raj Singh wherein the prosecutrix and the complainant identified the appellants Mangleshwar and Chandrapal.

10. In the matter of **Ravi @ Ravichandran**[1] it has been held that substantive evidence of identification of an accused is the one made

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[1] 2007 (5 & 6) SBR 473
[2] 2006(1) Crimes 719
[3] AIR 1988 SC 345
[4] AIR 1993 SC 2618

in the Court and the same can be based even if no test identification parade has been held, however where the report is lodged against unknown persons, a test identification parade is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. In para 18 of the judgment, it has been held that in the case of this nature, it was incumbent upon the prosecution to arrange a test identification parade. Such identification parade should be held as early as possible so as to exclude the possibility of the accused being identified either in police station or at some other place by the concerned witnesses or with reference to the photographs published in the newspaper and conviction should not be based on a vague identification.

11. In the matter of **Ranbir and others**[2], the Division Bench of this Court has held that where the accused was not previously known to the victim and incident took place in dark in night, identifying features of culprit must be mentioned in FIR or in statement given before police before identity of culprit is established on test identification parade.

12. In the matter of **Harinath**[3] also, it has been held that where the witnesses did not know the accused persons before the occurrence, their identification of the accused persons for the first time in the dock after a long lapse of time would have been improbable.

13. In the matter of **Girja Shankar Misra**[4] also, considering the delay in conducting test identification parade, it has been held that the same affects the evidence of the witnesses who participated in the test identification and the possibility of the witnesses having seen the accused persons cannot be ruled out.

14. In the light of the principles of law laid down in the aforesaid judgment, I propose to consider the fact of the instant case.

15. P.W. 2 the prosecutrix in para 1 of her statement has stated that she does not recognize the accused. She never saw them anywhere. The accused persons raped her. Both the accused persons present in Court and one more accused raped her. At that time, it was 10.30 in the night. Her maternal-grand-mother Kalista Lakda was present in the home and she was studying. Accused persons entered from the kitchen side and came to her room, put knife against her chest and threatened her to murder and Chandrapal

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threw her on the bed. Other two accused were also with this accused. Accused Chandrapal put his hand on her mouth whereupon she felt giddiness and thereafter he raped her. After commission of rape by accused Chandrapal, the other accused present in Court Mangleshwar also raped her and thereafter third accused also raped her who is not present in Court. Blood started oozing from her vagina. After being raped, she felt like loosing consciousness and she does not know where she went thereafter and she fell in a well. In paragraph 8, she has stated that the police took her Ambikapur for identifying the accused. The identification was conducted in jail where she identified both the accused persons. In cross-examination, she has denied the suggestion that she saw the accused persons in Jashpur police station. In para 15 of her statement, she has stated that all the 5 accused persons who entered in her house had put on mask over their faces and, therefore, they were not identifiable. Heights of all the five were similar. In para 18, she has further admitted that on the date of incident, the face of Mangleshwar was covered and on the date of identification, lower part of his body below the neck was covered.

16. P.W. 3 Kalista Lakda has also stated that on the date of incident at 10 P.M. she and her grand-daughter were present in the home. The prosecutrix was studying. At that time, she was sitting near the front door of her house. At that time, 5 accused persons entered from the kitchen side. They claimed to be persons belonging to MCC and they had shown Bomb and Pistol. They stopped her from shouting on the knife point and thereafter they took her to the near room where paddy is placed and they got her opened the lock. Thereafter they took out about Rs. 3000/- from the suitcase and solar plate. The prosecutrix told her that she has been raped by three persons. She has also stated that police called her to Jashpur where she identified accused Mangleshwar. In paragraph 7, she has admitted that all the persons had covered their faces and they were not identifiable. She went to lodge report with her husband and the prosecutrix where she sat out side of the police station and report was lodged by her husband and she put her signature in the report. She has further stated that she had mentioned this fact that all the accused persons had covered their faces and if this fact is not mentioned in the diary statement, she cannot give the reason. She

has stated that if Ex. D-1 mentions that only three persons covered their faces, then the same is wrong. In paragraph 20, she has stated that only eyes and upper portion of the body of the persons who had entered in her house were visible. It is correct to say that she identified by guessing. The accused persons were arrested on 15-2-2004, however they were put for identification only on 26-3-2004. Uday Raj Singh (P.W. 7) who has conducted test identification parade has stated that he conducted the identification in Jashpur jail. In the said identification, Kalista Lakda could not identify Chandrapal. P.W. 2 the prosecutrix and P.W. 3 Kalista Lakda identified Mangleshwar whereas the appellant Chandrapal was identified by the prosecutrix but Kalista could not identify him.

17. If the statements of P.W. 2 the prosecutrix and P.W. 3 Kalista Lakda are minutely scrutinized, it would be evident that the complainant did not give any description of the accused in the FIR. There is evidence available on record that all the accused persons had covered their faces when they entered the house where the incident occurred. There is no evidence that the witnesses who participated in the test identification parade or who identified the accused persons during trial saw the faces of the accused at the time of incident. There is no explanation by the prosecution for not conducting the test identification parade immediately after arrest of the accused who were arrested on 15-2-2004 whereas the test identification parade was held on 26-3-2004. Therefore, there is substance in the argument of the learned counsel for the appellants that the witnesses had an opportunity of seeing the accused persons in this period while they were being taken to the Court for remand proceeding. In these circumstances, implicit reliance on the statements of the prosecutrix and her maternal grand-mother Kalista Lakda regarding identification of the accused persons cannot be placed. The prosecutrix and the complainant have made material improvement in their statements regarding commission of rape by the accused persons. F.I.R. mentions that the prosecutrix informed the complainant that one person committed rape with her in her room, whereas in their statement before the Court, both the witnesses have stated that the prosecutrix was ravished by 3 persons.

18. It is already held that the identification by the prosecutrix and the complainant does not inspire confidence, the very foundation of

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the conviction of the appellants based on identification of the accused persons by the two witnesses is shaken.

19. For the aforesaid discussion, the conviction of the appellants by the trial Court under Sections 458/34, 395 and 376(2)(g) of I.P.C. cannot be sustained. In the result, the appeals preferred by the appellants are allowed. Their convictions under Sections 458/34, 395 and 376(2)(g) of I.P.C. and sentences imposed under those sections are set aside. The appellants be set at liberty forthwith if not required in any other case.

Sd/-
Dhirendra Mishra
Judge